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IN THE

Supreme Court of the United States

CITY OF CUYAHOGA FALLS, ET AL.,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' housing project has been built; the only claim remaining is one for damages allegedly arising from the timing with which petitioners issued building permits for the project. But, as demonstrated in our opening brief (at 3-5, 9-12), every official discretionary action of petitioners *supported* the project; and, under the then-binding City Charter (adopted and in effect since 1959), petitioners had no discretion to issue building permits while a petition for a referendum election was pending.

For this reason, as the opening brief further showed (at 9-20), contrary to the Equal Protection Clause and Fair Housing Act ("FHA") analysis of the Sixth Circuit, respondents do not have a cognizable claim against petitioners based on alleged discriminatory motives of the referendum petitioners: While such evidence would be relevant to whether government officials had denied a racially-mixed housing project for illicit purposes, it is legally irrelevant to the entirely distinct government action challenged here — to wit, petitioners' compliance with their legal duty under the City Charter to hold an election on the petition (and to withhold building permits pending the outcome of that election). Petitioners' compliance with the City Charter did not itself deny the equal protection of the laws or rights under the FHA; treating respondents' desired ordinance in the same way and on the same schedule as all other ordinances subject to referendum petitions would be treated cannot possibly constitute the differential treatment necessary for an Equal Protection and/or FHA violation. Moreover, the First Amendment would not permit petitioners to deny citizens their basic right to petition for, and hold, legally-mandated elections on the basis of alleged illicit viewpoints and motives of the petition's supporters.

As the opening brief also showed (at 15-20), the evidence upon which respondents rely is legally insufficient to establish that illicit bias was a causative motivation for the petition signed here by over 4,300 citizens. And, as the opening brief further showed (at 21-26, 26-32), there is no triable disparate

impact claim here under the FHA, and petitioners' compliance with the City Charter neither interfered with a protected property interest nor constituted arbitrary or capricious conduct. The arguments made in opposition are meritless.

I. RESPONDENTS' INTENTIONAL DISCRIMINATION CLAIMS ARE LEGALLY UNFOUNDED.

The Sixth Circuit held (Pet. App. 12a-13a, 17a, 22a, 23a) that respondents could establish intentional discrimination with proof that petitioners "gave effect" to alleged biases of private citizens by "allowing the fate of the project to be decided by referendum" and withholding building permits pending that popular vote. Respondents' brief, and those of their *amici*, are not so much a defense of the Sixth Circuit as they are an effort to change the subject. Their efforts fail.

1. Respondents and the National Fair Housing Alliance, *et al.* ("NFHA") principally argue (Resp. Br. 11-26; NFHA Br. 5-20) that petitioners acted in concert with private citizens to delay and stop the housing project for racial and/or anti-familial reasons. This argument is legally and factually unfounded.

First, with the exception of the obligatory withholding of permits, every official action of petitioners *supported* the housing project. Both the Cuyahoga Falls Planning Commission (JA 26) and the City Council (JA 17) voted in favor of the project. The Mayor withheld a veto (Pet. App. 93a). The City Engineer in turn granted a permit for the part of the project — the construction of a fence — unaffected by the filing of the petition. (JA 53-54). And when the City Council reconsidered the ordinance approving the project, it did not repeal the ordinance, as it was empowered to do. (JA 14-15; Tr. 196). In short, when respondents complain (Resp. Br. 12-17) that City officials imposed conditions on the project (that respondents accepted), urged citizens to express their concerns, postponed the City Council vote for a few weeks while further consideration was given to the matter, looked for legal ways to disapprove the proposed project, and even explored the

possibility of being sued, they overlook that all of petitioners' official discretionary acts were *in favor of* the project; indeed, none of the pre-decisional deliberative activities complained about even arguably caused the injuries alleged here.

Second, while the City Engineer withheld building permits pending the election, he had no discretion to do otherwise. The then-binding City Charter clearly prohibited the City and its officials from giving effect to the site plan approved by the City Council while the referendum petition was pending. (JA 14-15). Moreover, contrary to respondents' suggestion (Resp. Br. 24), petitioners were legally obliged to comply with the City Charter until it was held invalid.

Third, contrary to respondents' argument (Resp. Br. at 24-25), petitioners could not reject the referendum petition. Under State law, "if the petition is in proper form and contains sufficient signatures, the city's duty under this charter is to certify the initiative ordinance." *Ohio ex rel. Bond v. Montgomery*, 580 N.E.2d 38, 42 (Ohio Ct. App. 1989); *see also Stevens v. Bd. of Elections*, 160 N.E.2d 366, 367 (Ohio Ct. App. 1957) (filing of petition with requisite number of valid signatures "require[s] submission of the question to the electors"). Here, there is no claim that the petition was not in proper form or lacked the requisite signatures.

Fourth, contrary to the suggestion of NFHA (at 10), the City Council could not, at the May 28, 1996 meeting where it reconsidered its site plan ordinance, have declared the ordinance an "emergency" and thereby have effectively overridden the "automatic stay" effected by the petition. Under the City Charter, once the referendum petition was filed, the City Council's only option was to "repea[l]" the ordinance or "submit[] it to a vote of the electors" (JA 14, 15). Simply declaring the ordinance an "emergency" to circumvent the effect of the referendum petition was not an available option.

Finally, respondents' wild assertion (Resp. Br. 17-19, 26) that "the referendum was the end product of a posse, led by

Mayor Robart," is baseless. In dismissing claims asserted against Mayor Robart in his individual capacity, the district court found that "there is no proof that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions," and that "[t]he facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the referendum question to the Board of Elections." (Pet. App. 128a-29a (emphasis in original); *see also id.* at 50a ("There is no evidence that the Mayor had any authority to carry out these administrative tasks or that he had a hand in facilitating them.")). Respondents did not appeal these rulings and thus have waived any challenge to them. *See G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982).

The record in fact shows that petitioners did not initiate or lead the referendum effort. Frank Pribonic, one of the organizers, testified that the idea for the petition came from his son-in-law (JA 88) and that no official or employee of the city helped with it. (JA 87) ("[W]e did it on our own."")). Contrary to respondents' claim (Resp. Br. 17-18), the Law Director merely explained to the City Council that the ordinance "does not inhibit the public's right to initiate a referendum." (JA 174).

Indeed, it does not matter whether the Mayor or any other City official supported the referendum. The Mayor was entitled to express his personal views (as were other City officials). The Mayor had no official responsibility for the petition. The same is true for the other City officials who respondents complain about. The filing of a referendum petition was a power reserved to the voters, and was not an authority of the Mayor or these other City officials. Accordingly, any support that they allegedly gave to the referendum drive (through extracurricular activities) is legally irrelevant and cannot subject the City treasury to damages. *See, e.g., Bd. of County*

Comm'rs v. Brown, 520 U.S. 397, 400 (1997) (42 U.S.C. § 1983 does not "impose liability on a municipality unless *deliberate action* attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights"); *see also Screws v. United States*, 325 U.S. 91, 111 (1945) (acts of State officers "in the ambit of their personal pursuits" are not state action); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 741 (1998) (discussing "scope of employment" and related "agency" principles under Title VII).

In sum, there is no legal or factual basis for respondents' "concerted campaign" argument. The pre-decisional activities of petitioners to which respondents point did not result in adverse action by petitioners. Nor are they probative of petitioners' reasons for withholding the desired building permits pending the election. Those reasons were necessarily non-discriminatory ones, as the withholding of the permits was compelled by the City Charter.

2. Citing cases involving statutes and referenda enacted into law, respondents and the Lawyers' Committee, *et al.*, alternatively argue (Resp. Br. 26-31; Lawyers' Committee Br. 6-20) that this Court has long considered private animus to be probative of governmental purpose and that there is sufficient evidence here that petitioners embraced this private animus. This argument, which shares premises of the Sixth Circuit's defective reasoning, is also legally unsound.

First, to be clear, this case does not concern an enacted referendum. The referendum here never went into effect; to preserve their state court challenge to the City Charter, respondents suggested and the parties agreed to a stipulated order barring certification of the election results. (Pet. App. 7a). Accordingly, respondents do not claim that their injuries are attributable to the result of the referendum vote itself. Rather, respondents claim that their injuries are attributable to the referendum process and the time that passed while, pursuant to the City Charter, petitioners withheld building permits pending the results of that process.

Second, because the referendum never went into effect, the cases upon which respondents and their *amici* rely are entirely unhelpful to them. Those cases merely hold that, in appropriate circumstances, evidence of private animus may be probative of the intent of official action, whether by statute, referendum, or administrative decision. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 257-60 (1977); *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967). These cases do not suggest that private animus in invoking an earlier created procedural requirement creates a genuine factual issue concerning the intentions of government officials (such as the Clerk or the City Engineer) in connection with non-discretionary acts (such as those required by the City Charter). Equally important, these cases do not imply (much less hold) that a discriminatorily motivated referendum petition is itself actionable under the Equal Protection Clause and/or the FHA.

A statute or referendum in effect can itself deprive an individual of "the equal protection of the laws" (U.S. Const. amend. XIV, § 1). It can also effectuate one of the enumerated acts prohibited by the FHA (Pet. App. 259a-260a). In contrast, a petition to have an election cannot by itself legally do so.

Rather, a referendum petition merely provides for a public debate and popular vote about proposed housing. *See James v. Valtierra*, 402 U.S. 137, 140-43 (1971). Accordingly, a referendum petition is not itself ripe for equal protection or FHA challenge, because there is no final official action at that point. *See, e.g., Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (holding equal protection challenge to INS regulations unripe where "the Act requires each alien desiring the benefit to take further affirmative steps, and to satisfy criteria beyond those addressed by the disputed regulations"); *Pennell v. City of San Jose*, 485 U.S. 1, 11 n.5 (1988) (holding equal protection challenge to rent control ordinance unripe because the provision had not yet been finally applied to the landowners' tenants and was discretionary); *Oxford House, Inc. v. City of Virginia Beach, Virginia*, 825 F. Supp. 1251, 1260-61

(E.D. Va. 1993) (same). Indeed, because the referendum petition does not itself establish any final government action, any alleged Equal Protection and/or FHA injury is too "remote" or "speculative" to be justiciable. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 757 (1984).

Nor does an Equal Protection or FHA claim arise just because, under the long-standing provisions of the City Charter, the filing of the referendum petition prevented petitioners from giving immediate effect to the site plan ordinance of the City Council. The City Charter made clear that, until the citizenry had had an appropriate opportunity to determine the matter for themselves, the ordinance of the City Council was not final. Accordingly, withholding building permits pending the popular vote on the next scheduled election date did not deny equal protection of the laws or rights under the FHA, just as withholding building permits during the time that the City Council reviewed the Planning Commission's decision did not do so. Rather, there was no final governmental action at either point, and neither the Equal Protection Clause nor the FHA gives respondents a legal basis for pretermitting or expediting either step of this mandatory process. *See Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (agency inaction reviewable, if at all, only where "the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities"); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding unripe for challenge an administrative report because "its effect on reapportionment is felt only after the President makes the necessary calculations and reports the result to the Congress"); *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (ripeness doctrine "protect[s] the agencies from judicial interference until an administrative decision has been formalized").

Treating respondents' desired ordinance the same way and on the same schedule as all other ordinances subject to referendum petitions would be treated cannot constitute the

differential treatment necessary for a cognizable denial of "equal protection" or rights under the FHA. Treating all ordinances similarly is in fact the antithesis of disparate treatment.

Third, whereas the viewpoints expressed by private citizens may appropriately be considered in determining whether a final governmental action is illegally motivated, such citizen viewpoints may not properly be considered by government officials in determining whether to allow an election petition and/or to withhold building permits pending the election. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

Indeed, "the freedom of speech guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (internal citation omitted). For this reason, even wholly *content-neutral* and far less substantial burdens on petitioning have been invalidated, because "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* (invalidating ban on paying petition circulators). *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999) (invalidating prohibition against anonymous petitioning).

Thus, it does not matter whether the referendum organizers had illicit motives. Whether the referendum would pass and be illegal or unconstitutional is hypothetical and not ripe for determination — which is why courts routinely refuse to review the legality of referenda prior to their passage. *See, e.g., Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988); *Ranjel v. City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969); *Mulkey v. Reitman*, 413 P.2d 825, 829 (Cal. 1966) (in bank), *aff'd*, 387

U.S. 369 (1967). Moreover, unless unlawful conduct is imminent, government may not bar speech merely because it advocates unlawful action, even unlawful racist action. *Accord Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Since there is no clear and present danger with a referendum petition, government has no right to deprive either the 10% of the community supporting the petition of their right to engage in "interactive communication concerning political change that is . . . 'core political speech'" (*Meyer*, 486 U.S. at 422), or the remaining 90% of the community of their basic "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)).

It is no answer (Resp. Br. 27-30) that "[t]his is not a lawsuit against citizens" but one against the City and its officials. Petitioners cannot be *obligated* to take the very same action against First Amendment rights that is foreclosed to the courts. *See Alexander v. United States*, 509 U.S. 544, 554 n.2 (1993).

Finally, even assuming a legally cognizable claim is presented, respondents and their *amici* err in suggesting (Resp. Br. 11-12, 19-26; NFHA Br. 6-11; Lawyers' Comm. Br. 16-20) that the record supports a finding of intentional discrimination by petitioners. It does not.

It is important to reiterate that the City Charter is neutral on its face and that the actions of the City Clerk and City Engineer, in accepting the referendum petition and withholding building permits pending the election, were ministerial and mandatory. The challenged actions would have thus necessarily occurred and, therefore, cannot be violative of Equal Protection and/or the FHA. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In addition, respondents cannot even establish that the referendum petition was illicitly motivated. This Court does not appear to have decided whether the intent of multiple citizens on a referendum is a factual question for a jury or a

question of law for a court. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("[T]he extent to which one characterizes the intent issue as a question of fact or a question of law[] will vary in different contexts."). In either event, to establish that a facially neutral petition was illicitly motivated, bias had to be a determining factor in the petition's filing. *See Village of Arlington Heights*, 429 U.S. at 265-66. It is not sufficient to show that a few supporters of the petition were improperly motivated. *See Washington v. Davis*, 426 U.S. at 253 (Stevens, J., concurring) ("[i]t is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process"). Rather, it must be shown that, but for the allegedly improper motivations, the petition would have lacked the requisite signatures. *See Village of Arlington Heights*, 429 U.S. at 265-66; *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810) (noting that "if less than the majority act[s] from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned."); P. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. Ct. Rev. 95, 119-25 & n.144. Yet the record here is barren of evidence about the motivations of the petition's over 4,300 signators. The circumstantial evidence upon which respondents rely is not sufficient to fill this void.

With respect to respondents' projected effects of the referendum (if it passed), there is no evidence that the mass of petition signators were even aware of those projections. Moreover, this Court has held that, where the burden of a facially neutral action falls substantially on the allegedly preferred class as well as on the class against whom discrimination is alleged, there can be no permissible inference of intentional discrimination. *See, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 275 (1979) (because "significant numbers of nonveterans are men, and all nonveterans — male as well as female — are placed at a disadvantage," "[t]oo many men are affected . . . to permit the inference that the statute is

but a pretext for preferring men over women"); *accord id.* at 281 (Stevens, J., concurring) ("the number of males disadvantaged . . . is sufficiently large — and sufficiently close to the number of disadvantaged females . . . — to refute the claim that the rule was intended to benefit males as a class over females as a class"). Here, respondents' own statistics establish that any denial of respondents' housing project would have affected large numbers of non-African Americans (up to 75% of the "perhaps likely" residents) and households without children (42% or 43% of the "perhaps likely" residents). (*See* Tr. 214, 216, 218-20; JA 271-90).

Nor is the historical background suggestive of discriminatory motivation by the thousands who signed this facially neutral petition. Citizens in Ohio, including the citizens of Cuyahoga Falls, have a long and rich tradition of using referenda. *See* Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. Cin. L. Rev. 541, 559 (1984). Moreover, while the City Council had previously approved another development for respondents' site, it had done so before the neighboring condominiums were developed (and the proposed project had not involved low-income housing). (JA 43). Thus, when this project was proposed, citizens voiced a host of non-discriminatory concerns — including, among other things, concerns about increased crime, lack of capacity in the schools, increased burden on local police and fire departments, diminishing surrounding property values, traffic, increased population density, damage to the drainage system from the heavy equipment at the site, and possibilities of increased taxes. (JA 39, 40, 41, 42, 153, 177, 183, 186, 187). And, notably, the citizens of Cuyahoga Falls had not sought to prevent another development (on Prange Drive) that, as is conceded (Resp. Br. 20), has a substantial number of African-American residents and households with children. These circumstances belie the systemic discriminatory intent among the petition's 4,300 signators asserted by respondents.

The handful of ambiguous comments upon which respondents rely (Resp. Br. 3-4, 20-21) likewise provide no basis for inferring such systemic discriminatory motives. This Court has long recognized that statements from a small subset of the pertinent decisionmakers are insufficient even for determining legislative intent, let alone for imputation of an illegal motive. *See, e.g., Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982) (holding that "isolated statements" from the legislative history are "too thin a reed" by which to discern congressional intent); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (noting the insufficiency of "stray remarks in the workplace" as a basis for Title VII liability). Yet the statements upon which respondents rely are few in number; constitute only a small subset of many statements — the vast proportion of which were plainly non-discriminatory — made at meetings attended by at least sixty people; and were directed only at whether the Planning Commission and/or the City Council should approve the housing project, not at whether a petition should be filed. (Tr. 36; JA 35-52, 134-99). Moreover, a fair-housing "tester" attended the organizational meeting for the petition itself and testified that the attendees were counseled that concerns about children and other possibly discriminatory remarks should not be part of the signature gathering effort. (Tr. 292-95, 300). And, most critically, respondents offer no evidence that the persons making the challenged remarks were among those who signed the petition, much less any evidence that the challenged statements are representative of the views of the over 4,300 signators. Respondents' case is rank speculation.

Finally, evidence that the referendum organizers were motivated by bias would not be legally sufficient to establish that petitioners were so motivated — and illegal motivation by petitioners is a necessary element of the claims asserted here. To be sure, evidence that private biases were a motivating cause of a referendum enacted into law might allow a court to enter "minor" and "ancillary" injunctive orders to prevent implementation of that law by non-wrongdoers (such as

petitioners). *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982). But, to obtain damages, such evidence would not be sufficient, because wrongful intent by the defendant is a necessary element of a violation, and because the City and its officials are not vicariously responsible for the citizens' alleged illicit intent (since the citizens are not subject to their "control"). *Id.* at 391-97; *cf. Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (private conduct is not State action unless government has either used "coercive power" to compel the conduct or has been so involved in it "that the choice must in law be deemed to be that of the State"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (same).

II. THE SIXTH CIRCUIT'S DISPARATE IMPACT RULING SHOULD BE REVERSED.

The Sixth Circuit alternatively held (Pet. App. 23a-25a) that respondents could proceed with an FHA disparate impact claim. Although they pursued this claim in both courts below and opposed *certiorari* on the issue (Opp. Br. 7-8), respondents now assert (Resp. Br. 31) that they are "withdrawing and abandoning their disparate impact claim in this litigation." This assertion merits a brief response.

First, respondents' assertion does not deprive the Court of jurisdiction to decide this issue. The adverse judgment of the Sixth Circuit remains in place, and respondents have asked (Resp. Br. 50) that that judgment be affirmed. There is still a "case" or "controversy" requiring resolution.

Second, although petitioners are fully prepared to accept respondents' abandonment of the claim and be done with the issue, the judgment below on this issue should be reversed and the claim ordered dismissed with prejudice. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994). Respondents should also be barred from ever seeking any fees or costs associated with pursuit of this claim.

Third, as with respondents' intent-based claims, there is no final action here ripe for disparate impact challenge; the

petition for an election (and accompanying withholding of building permits) did not decide anything. Moreover, as the United States and respondents' own *amici* agree (U.S. Br. 10 n.1; NFHA Br. 20-22), this single application of the City Charter is not a proper basis for a disparate impact claim. And, as the United States demonstrated in its brief in *Town of Huntington, New York v. Huntington Branch, Nat'l Ass'n for Advancement of Colored People*, No. 87-1961, at 7A-11A, reprinted as Appendix A, both the text and legislative history of the FHA are best understood as requiring illegal intent.

Contrary to the argument of respondents' *amici* (NFHA Br. 23-25; Lawyers' Committee Br. 20-29), recognition of disparate impact claims under Title VII is not a proper basis for recognizing such claims under the FHA. In construing Title VII to allow disparate impact claims, the Court has relied on the distinct purposes of that statute; and it has derived that doctrine from the "adversely affect[s]" language of 42 U.S.C. § 2000e-2(a). *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976); *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 986-88 (1988). The FHA, however, has different purposes and no such "adversely affect[s]" language; rather, it has the simple "because of," "on account of," and "based on" language that this Court has traditionally read as expressing an intent requirement. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993); *Gen. Building Contractors Ass'n*, 458 U.S. at 388-89 n.15.

Indeed, given the statistical disparities in wealth and income among different races, sexes, religions, etc., allowing disparate impact claims under the FHA would call into question many longstanding and accepted housing practices. As this case demonstrates, it would also empower civil juries to reweigh the myriad non-discriminatory considerations that citizens, government officials, and private businesses consider in adoption of such housing practices (because, unlike Title VII disparate impact claims, FHA claims are subject to jury trial). There is no basis for believing that Congress intended the FHA

to have such radical consequences. *See* R. Reagan, *Remarks on Signing the Fair Housing Amendments Act of 1988*, 24 Weekly Comp. Pres. Doc. 1140-41 (Sept. 15, 1988); R. Clegg, "Home Improvement," *Legal Times*, Oct. 7, 2002, at 60-61.

III. RESPONDENTS' SUBSTANTIVE DUE PROCESS CLAIM IS WITHOUT MERIT.

As a third ground for decision, the Sixth Circuit held (Pet. App. 26a-33a) that respondents had a triable substantive due process claim arising from the "delay" in issuance of building permits. Respondents' defense of this judgment is unavailing.

1. Respondents initially argue (Resp. Br. 32, 33-38) that they had a protected property interest through their ownership of the land — an argument not relied upon by the Sixth Circuit — and through their expectation in the benefits of the site plan approved by the City Council. This argument errs.

First, while respondents plainly have a property interest in the land, that property interest has no relevance. Petitioners have never deprived respondents of the land. This case is only about the time that it took to get building permits.

Second, respondents' argument about the site plan is both wrong and irrelevant. Respondents did not have a protected interest in that site plan, because the then-binding City Charter expressly provided that the approval of the site plan had no effect until, among other things, the time for filing a referendum petition had passed or, if one was filed, any such petition was finally decided. Accordingly, respondents could not claim a legitimate expectation in the benefit of that site plan approval. In any event, respondents have not been deprived of that site plan approval (and have now built the housing project). Thus, that alleged property interest is also irrelevant.

To be sure, respondents complain that they should have been provided with building permits sooner. But respondents did not have a protected property interest in receiving building permits

within a particular time period, much less in a more accelerated time period than that provided for by the City Charter.

This Court's Taking Clause cases establish that delays incidental to a land use approval process generally do not give rise to cognizable claims. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1485 (2002) ("A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."); *First English Evangelical Lutheran Church v. County of Los Angeles, California*, 482 U.S. 304, 321 (1987) (distinguishing "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like"); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980) ("[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership"). There is no basis for construing substantive due process doctrine to give rise to a damages claim for such delays where the Taking Clause does not.

Moreover, the time that petitioners took to issue the building permits was not extraordinary at all. Respondents applied for the permits in January 1996; the Planning Commission approved respondents' proposed site plan in February 1996; the City Council approved the plan in April 1996; and, after the referendum petition was filed, petitioners scheduled a vote for the next upcoming election (in November 1996). While litigation about this election consumed another two years, it was respondents who sought the consent order barring the certification of the election results; it was respondents who were unable to convince the district court to order issuance of the building permits; and it was respondents who elected not to pursue an original action in the Ohio Supreme Court, and who thereby added to the delay from the litigation. Indeed, it was respondents who chose to secure their time-sensitive tax credits before obtaining building permits, even though they were legally free to proceed in the opposite sequence (and would

have had less risk and obtained additional points from the tax authorities had they done so). (Ohio Housing Finance Agency, "Housing Credit Program Qualified Allocation Plan," Part II(C)(8), at 17, IV(a)(1)-(2), at 32). In short, respondents cannot properly complain that an unreasonable amount of time passed before they received their building permits, much less that they had a protected property interest in the timing of the process. Any "expense and disruption" from the process is not judicially cognizable, *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 244 (1980), as it is just "part of the social burden of living under government." *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938).

2. The withholding of the building permits pending the resolution of the referendum petition (by either popular vote or judicial invalidation) was plainly not "arbitrary" or "capricious." The arbitrary and capricious standard "does not mean simply erroneous." *Crider v. Bd. of County Comm'rs*, 246 F.3d 1285, 1289 (10th Cir. 2001) (internal quotation marks omitted); *see also Regents, Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Rather, "the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)). Here, submission of the housing project to an election was required by the City Charter and was judicially upheld three times. As such, the withholding of the building permits was not even arguably arbitrary or capricious. Respondents' contrary arguments are in error.

a. Again departing from the Sixth Circuit, respondents argue (Resp. Br. 39-44) that submission of the ordinance to popular vote was a *per se* due process violation. Respondents claim that administrative decisions may not be decided by majority vote, that voters may not be delegated the power to

prohibit lawful land uses, and that it is arbitrary and capricious to allow voters to decide such matters without discernible standards to guide them. Respondents are wrong.

In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court held that requiring proposed land use changes to be ratified by referendum did not violate due process. The Court ruled that "[a] referendum cannot . . . be characterized as a delegation of power" but rather is an exercise of "reserved" power by the people. *Id.* at 672, 673. The Court further found that "[t]he power of initiative or referendum may be reserved or conferred 'with respect to any matter, legislative or administrative, within the realm of local affairs . . . .'" *Id.* at 674 n.9 (quoting 5 E. McQuillan, *Municipal Corporations* § 16.54, at 208 (3d ed. 1969)) (ellipsis in *Eastlake*). In addition, the Court held that due process does not require that voters receive "standards to guide their decision," noting that the requirement of "discernable standards" relates to delegated powers and not to "a power reserved by the people to themselves." 426 U.S. at 675. In short, respondents' arguments were all rejected in *City of Eastlake*.

Contrary to respondents' suggestion (Resp. Br. 40), *City of Eastlake* cannot be distinguished on the ground that it "was a rezoning case and thus the referendum there was on a legislative matter." The *Eastlake* Court expressly held that, consistent with due process, the power of referendum "may be reserved or conferred with respect to any matter, legislative or administrative." 426 U.S. at 674 n.9 (internal quotation marks omitted). Moreover, while disagreeing about its resolution, both the majority and dissenting opinions in the case recognized that the critical question for decision there was whether a citywide referendum for approval of a particular land use proposal was a procedure consistent with due process. *See id.* at 670, 679 & n.13; *id.* at 680 (Powell, J., dissenting); *id.* at 692-94 (Stevens, J., dissenting). The resolution of that question simply did not turn on the fact that the landowner was seeking a "rezoning" or that a rezoning could be characterized as

"legislative" rather than "administrative." *Accord, Pro-Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 513 (7th Cir. 1995) ("The Supreme Court . . . has held that even the functional equivalent of a petition for a variance may be put to a referendum."); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436-37 (4th Cir. 2002) (*City of Eastlake* allows a referendum on individual building permit).

Indeed, as the *Eastlake* Court noted, many jurisdictions subject all manner of land use matters to referenda, and courts have long sustained those powers. *See, e.g., Barnes v. City of Miami*, 47 So. 2d 3, 4 (Fla. 1950); 5 Eugene McQuillin, *The Law of Municipal Corporations* § 16.54, at 289 (3d ed. 1996) (footnote omitted) (collecting cases). The handful of cases that respondents rely on (Resp. Br. 42 n.77) either do not address any due process issue at all (*see Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Ore. 1973) (en banc); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972) (en banc)), address due process problems stemming from abridgment of the State's own notice and hearing requirements (*see Transamerica Title Ins. Co. Trust v. City of Tucson*, 757 P.2d 1055 (Ariz. 1988) (in banc); *City of Scottsdale v. Superior Court*, 439 P.2d 290 (Ariz. 1968) (in banc)), or have subsequently been construed not to stand for respondents' proposition (*see Margolis v. Dist. Court*, 638 P.2d 297, 305 (Colo. 1981) (en banc) (expressly disclaiming respondents' reading of *Snyder v. City of Lakewood, Colo.*, 542 P.2d 371 (Colo. 1975) (en banc)). And, while *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000), couched its ruling in terms of a legislative/administrative distinction, it clarified that land-use measures that "operate[] prospectively," such as the referendum contingency at issue here, are permissible, and that its holding encompassed only "[t]he lawful destruction of existing property," *id.* at 622, which is not here at issue. In short, respondents' argument is unsupported in the law and, if accepted, would invalidate numerous governmental charters.

b. Respondents also err in suggesting (Resp. Br. 45-49) that they are entitled to a trial on whether there was a rational basis for petitioners' withholding the building permits once the City Council had approved their site plan. The rational basis for petitioners' action was, of course, the provision of the City Charter that did not allow the City Council ordinance to go into effect if a referendum petition was filed.

Contrary to respondents' contention, due process did not require petitioners to determine whether the referendum petition had a rational basis *before* conducting an election on it. No such inquiry was authorized by the City Charter or any other State law; and *City of Eastlake* held that, while the result of a referendum is subject to due process challenge, the fact of the referendum election is not. 426 U.S. at 675-79.

Respondents similarly err in suggesting that, because the City Council approved respondents' site plan, the voters could not rationally reject it. Again, since the site plan was never rejected, that question is not presented. Further, like all zoning codes, this zoning code contains quite general discretionary criteria that the citizenry could rationally apply differently than did the City Council. (*See* JA 13a-14a, 17a-19a). Moreover, in exercising their reserved powers, the citizenry are not limited by the criteria of the zoning code; rather, as *City of Eastlake* held, they are limited only by the Due Process Clause's requirement that the result of their referendum has a rational relationship to the general police power. 426 U.S. at 676. The concerns voiced by the citizens of Cuyahoga Falls would plainly satisfy that requirement.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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No. 87-1961

IN THE

Supreme Court of the United States

October Term, 1987

TOWN OF HUNTINGTON, NEW YORK, ET AL., APPELLANTS,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Town of Huntington's zoning ordinance, which on its face prevented private construction of multi-family low-income housing outside an urban renewal area, and the Town's refusal to rezone a specific site to permit such construction violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, on the basis of findings that the Town's actions had a discriminatory effect on minority residents and lacked sufficiently legitimate justifications.

DISCUSSION

1. This case comes before the Court as an appeal pursuant to 28 U.S.C. 1254(2). Because the court of appeals struck down a portion of the Town's ordinance, and because the Town's jurisdictional statement is fairly understood to challenge that action,[11] we believe that this Court's appellate jurisdiction has been properly invoked. The case is appropriately treated as an appeal because the Town is "relying on a State statute held by a court of appeals to be invalid as repugnant to the * * * laws of the United States" (28 U.S.C. 1254(2)).

In contesting the court of appeals' invalidation of the ordinance (as distinct from its order directing rezoning), however, the Town raises no issue meriting this Court's plenary consideration. The Town conceded below that a discriminatory impact or effects test governs the Title VIII challenge to the ordinance. See Defendants' Trial Mem. 48; Appellees' C.A. Br. 27-29, 37; J.S. App. 16a-17a, 62a-63a. And we do not read the Town even now as arguing to the contrary. It rather appears to pursue the argument, initiated below, that the properly applicable effects test has been misapplied. See J.S. 21-28.

We believe that there is a substantial question, meriting this Court's attention, as to whether an intent test or an effects test governs under Title VIII. Indeed, we believe that the court below, and the other courts of appeals which have addressed the issue, have erred in holding that a showing of discriminatory effect will suffice. Since the court below

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[11] J.S. 29. The Town appears to be concerned primarily with the court of appeals' order of site-specific relief, rather than with the court's striking down of the ordinance. Each of the five questions presented in the jurisdictional statement appears to have as its central focus the court of appeals' action in overriding the Town's refusal to rezone appellees' site for multi-family housing.

decided that discriminatory intent is not an essential element of a Title VIII violation, that issue can be reviewed by this Court. At the same time, if the Court were disposed, contrary to our recommendation, to exercise its discretion to decline to hear the remainder of the case on the merits,[12] see p. 11, *infra*, it would be proper to affirm summarily the court of appeals' partial invalidation of Section 198-20 of the Code of the Town of Huntington. We believe that such an action would be appropriate, however, only to the extent that it made clear that no determination of the proper burden of proof under Title VIII was thereby implied.

2. Such a disposition of the issue on which appellate jurisdiction is predicated would not dispose of the Town's challenge to the court of appeals' order that it rezone the land in issue for multi-family housing. Indeed, the Town primarily emphasizes the rezoning issue in its jurisdictional statement. See J.S. 1-5, 28-30. While this Court need not review the rezoning issue simply because the Court's appellate jurisdiction has been invoked with regard to the accompanying issue of the invalidation of the ordinance, the Court may appropriately exercise its discretion to reach and decide the remaining issue in the case. See *Davis v. Scherer*, 468 U.S. 183, 189-190 & n.7 (1984); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4037, at 62-64 (1988).[13] We believe that the Court should do so here.

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[12] If the Court determines, as we recommend, to consider the rezoning issue on the merits, and thus to review in that context the issue of an intent versus an effects test under Title VIII, we urge the Court simply to note probable jurisdiction, and defer judgment on any aspect of the merits until after briefing and argument.

[13] There is an "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (footnote omitted). See *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (referring to Court's practice of strictly construing statutes authorizing appeals).

The exercise of discretion in the immediate context operates in the same manner that is appropriate for determining whether to grant certiorari. Factors weighing against such an exercise of this Court's discretion are readily identifiable.

First, while the Town has technically preserved the position that an intent test should be applied with regard to the rezoning decision, it appears that the argument for that position has been pressed in an ambiguous and internally inconsistent manner. The Town defended its refusal to rezone principally on the ground that plaintiffs had not properly applied for rezoning. See J.S. 4, 12-13, 15, 28; J.S. App. 79a-80a; Mar. 3, 1988 Tr. of Oral Arg. 30-31, 36-37; R. A-39. Its repeated reference to the *McDonnell Douglas* test was directed primarily to the point that plaintiffs had failed to satisfy a critical element of the prima facie case—the requirement of application. Further, the Town conceded below that a discriminatory effect standard applied to plaintiffs' challenge to the zoning ordinance and argued only that the *McDonnell Douglas* test governed plaintiffs' rezoning claim. See Appellees' C.A. Br. 26-47; J.S. App. 16a-17a, 62a-63a. More to the point, the Town's apparent assertion of two distinct standards under the Fair Housing Act leaves substantial uncertainty about whether and on what basis it is claiming that one must ever prove intentional discrimination. The Town's jurisdictional statement itself contains little reference to that point. Compare J.S. at i with J.S. 20-28.[14]

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[14] In analogous circumstances, this Court has declined to review cases where the

> issues * * * remain unfocused because they (were) not pressed * * * with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation * * *.

United States v. Fruehauf, 365 U.S. 146, 157 (1961).

Further, this is not a case presenting a sharp conflict in the circuits. The courts of appeals have consistently held that the Fair Housing Act does not require proof of intentional discrimination.[15] And, while there are some troublesome discrepancies among the courts regarding the appropriate standard for evaluating the defendant's justifications, these differences do not constitute a clear conflict.[16]

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[15] *E.g.*, *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977) (*Arlington Heights II*), cert. denied, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-1187 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

This Court has not decided what proof the plaintiff must present to establish unlawful discrimination under Title VIII. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that a municipality's refusal to rezone a parcel of land violated the Equal Protection Clause only upon a showing of purposeful discrimination; remanding the case for consideration of whether the village had violated Title VIII).

[16] In *Arlington Heights II*, 558 F.2d at 1290, the Seventh Circuit cautioned courts to exercise discretion when considering Title VIII actions premised only on discriminatory effect and instructed courts to evaluate the strength of the defendant's "interest" in taking the challenged action. The Third Circuit, in *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 149, agreed that courts must use their discretion when deciding such lawsuits. Moreover, the *Rizzo* court fleshed out the standard for evaluating the defendant's proffered justification for the challenged action (*ibid.* (footnote omitted)):

> a justification must serve * * * a legitimate, bona fide interest of the * * * defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

The Eighth Circuit, although using the phrase "compelling governmental interest" in *United States v. City of Black Jack*, 508 F.2d at 1185, to describe the defendant's burden, actually adopted a standard substantially similar to that later adopted by the Third Circuit in *Rizzo*. See *id.* at 1186-1187; see also *Hanson v. Veterans Admin.*, 800 F.2d at 1386 ("showing of a significant discriminatory effect" establishes violation of Title VIII).

Notwithstanding these considerations, we urge the Court to exercise it discretion to review the court of appeals' rezoning decision holding that an effects rather than an intent test is applicable under Title VIII. We reach that conclusion based on the importance of the issue and the incorrectness of the decision below.

The principal operative provision of Title VIII (§ 804(a), 42 U.S.C. 3604(a)), makes it unlawful

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

Although proscribing a broad range of conduct, Congress limited that proscription to action taken "because of race."[17] The words "because of" plainly connote a causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a

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[17] Three of the other prohibitions set forth in the Fair Housing Act also pertain to actions taken "because of" race or color. See 42 U.S.C. 3604(b) (terms or conditions of sale or rental), 42 U.S.C. 3604(d) (representation of unavailability of property for sale or rental), and 42 U.S.C. 3605 (denial of financial assistance). One section, pertaining to real estate advertising, bars any indication of "preference, limitation, or discrimination based on race, color * * *" (42 U.S.C. 3604(c)), and another, relating to participation in multiple listing services, prohibits discrimination "on account of" race or color (42 U.S.C. 3606). A final section makes it illegal to attempt to induce any person to sell or rent "by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race (or) color" (42 U.S.C. 3604(e)).

requirement of discriminatory motivation.[18] See *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). An action taken because of some factor other than race, *i.e.*, financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute.[19]

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[18] Interpretation of similar or related language in various civil rights statutes does not resolve the meaning of Title VIII's "because of" phrasing. On the one hand, Congress has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for example, Congress required covered jurisdictions to seek preclearance of any voting change and to show that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *."

In holding that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, before its amendment in 1982, required a showing of purposeful discrimination, the Court did not discuss that provision's requirement that discriminatory action be taken "on account of race." See *City of Mobile v. Bolden*, 446 U.S. 55, 60-65 (1980); see also *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits exclusion from participation in federal programs "on the ground of race," requires proof of discriminatory intent).

At the same time, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court construed the "because of" language in 42 U.S.C. 2000e-2(a)(2) as prohibiting employment practices and that had discriminatory effects and rejected the contention that the language barred only intentional discriminatory practices. See 401 U.S. at 432. The Court has twice reserved the question whether 42 U.S.C. 2000e-2(a)(1), which contains "because of" phrasing, requires a showing of discriminatory intent. See *General Electic Co. v. Gilbert*, 429 U.S. 125, 137 (1976); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977).

[19] The courts of appeals have not presented a plausible alternative reading of the statutory language. In *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 146, for example, the court acknowledged that the "'because of race' language might seem to suggest that a plaintiff must show some measure of discriminatory intent," but rejected this logical consequence in part because such a requirement would unduly burden Title VIII plaintiffs. See

The legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination.[20] Neither supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate. Rather, the legislative history shows that Congress sought to eliminate intentional refusals to sell or rent housing because of the race of the renter or buyer and believed that financial ability should remain the most important factor in property transactions. Members of Congress emphasized that the bill was designed to make financial ability, rather than race, the principal

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id. at 146-147. Similarly, in *Arlington Heights II*, 558 F.2d at 1288, the court noted that "[t]he major obstacle to concluding that action taken without discriminatory intent can violate (Title VIII) is the phrase 'because of race' * * *." The court, however, proceeded to embrace "[t]he broad view * * * that a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent" (*ibid.*). This reasoning is directly at odds with *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), where this Court, in defining "discriminatory purpose," stated (*id.* at 279 (citation and footnotes omitted)) that the phrase

> implies more than intent as volition or intent as awareness of consequences * * *. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

[20] Because Title VIII, as enacted, was offered as a floor amendment, there are no committee reports. The legislative history consists primarily of statements by representatives and senators on their respective floors. Congress also held hearings, the record of which further supports reading Title VIII as requiring intentional discrimination. See *Fair Housing Act of 1967: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 22-23 (1967) (remarks of Sen. Mondale) (bill is "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or [sic] does not apply to zoning requirements, ordinances, and the rest").

qualification for purchasing or renting housing. See, *e.g.*, 114 Cong. Rec. 2277 (1968) (Sen. Mondale).

Senator Mondale, a leading sponsor of the legislation, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone solely on the basis of race." (114 Cong. Rec. 4974 (1968)). Senator Hart echoed these sentiments (see *id.* at 4976). Senator Mondale also emphasized the limits of the bill's prohibitions (*id.* at 5643):

> The bill permits an owner to do everything that he could do anyhow with his property * * *, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color and that is all * * *.

Not only do the statute's language and legislative history show that a violation of Title VIII requires intentional discrimination, substantial practical problems result if this requirement is discarded. In particular, the courts have acknowledged the difficulties in placing meaningful limits on the discriminatory effect standard of liability. See, *e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 148-149; J.S. App. 23a. While proponents of such a standard have turned to Title VIII as a model, "in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related" (J.S. App. 23a).[21] The

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[21] Courts which adopt the discriminatory effect standard have relied on two aspects of the legislative record. See, *e.g.*, *Arlington Heights II*, 558 F.2d at 1289-1290. The first is the language of 42 U.S.C. 3601, stating that the purpose of Title VIII is "to provide, within constitutional limitations, for fair housing throughout the United States." The second is Senator Mondale's statement that Congress designed the Act to create "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968); see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The first statement appears to offer little but a truism and the second, although

hundreds of zoning decisions made by localities every year inevitably involve a mix of factors, some objective, such as traffic or sewage concerns, and some aesthetic, such as density and recreation concerns. Indeed, intangible factors that contribute to the quality of life in a community are legitimate subjects of zoning regulations entitled to judicial deference. See *Village of Belle Terr v. Boraas*, 416 U.S. 1 (1974). The importance of permitting individuals to shape the communities in which they live advises against invalidating zoning decisions enacted without discriminatory intent. And the subjective nature of many of the goals served by zoning renders judicial review of such zoning decisions particularly difficult. The drifting away from the statute's language requiring intentional discrimination has only exacerbated the inherent difficulties of this judicial function.

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stating an admirable goal, does not address the means of achieving it. The argument that the ambitious goals of Title VIII require an expansive reading of the statute to include a discriminatory effect standard hardly surmounts the obstacles posed by the statute's plain language and legislative history.

Congress is currently considering legislation designed to strengthen enforcement of the Fair Housing Act by permitting persons aggrieved by housing discrimination to file administrative claims subject to judicial review. The proposed legislation would also broaden the enforcement authority of the Attorney General and HUD. See H.R. Rep. 100-711, 100th Cong., 2d Sess. (1988).

CONCLUSION

We urge the Court to note probable jurisdiction. However, should the court be disinclined as a matter of its discretionary jurisdiction to reach the rezoning issue, it should summarily affirm the invalidation of Section 198-20 of the Code of the Town of Huntington on which the effects versus intent test issue has not been preserved), making clear at that time that it is declining to reach the other issues presented in the case. See *Davis v. Scherer*, 468 U.S. at 190 n.7.

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